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No. 71-1162

In the Supreme Court of the United States

OCTOBER TERM, 1971

DR. N. JAY ROGERS, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (Pet. App. 11-17) is reported at 316 F. Supp. 422. The opinion of the court of appeals (Pet. App. 18-45) is reported at 454 F.2d 234.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1971. A petition for rehearing was denied on January 31, 1972. A motion for stay of mandate was granted on February 10, 1972. The

petition was filed on March 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when an employee has filed a charge with the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the charge alleges discrimination by the employer (an optometrist) in terminating the employee and in segregating patients, the statutory authority of the Equal Employment Opportunity Commission to obtain "evidence relevant or material to the charge under investigation" encompasses information relating to the segregation of patients.

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, are set forth in the Appendix, *infra*, pp. 9-11.

STATEMENT

In April 1969, Mrs. Josephine Chavez filed a written charge with the Equal Employment Opportunity Commission which stated (Pet. App. 12):

> The above company has discriminated against me because of my national origin Spanish Surnamed American [1] by:

[1] Petitioners here suggest that Mrs. Chavez is not of Spanish-American ancestry (Pet. 6), a contention apparently not presented to either court below (Pet. App. 12, 19, 30, 34).

a. Terminated me from my job without a reason. I was the only Spanish surnamed American employed with seven Caucasian females who abused me. The manager told me my work was alright but he had to let me go because of friction.

b. segregated the patients.

After petitioners, Mrs. Chavez's employers, were served with a copy of the charge pursuant to 42 U.S.C. 2000e-5, the Commission requested certain information from them so that it might conduct an investigation. After no information was forthcoming from petitioners, the Commission served them, pursuant to 42 U.S.C. 2000e-9, with a Demand for Access to Evidence. It is petitioners' subsequent effort to set aside or modify this Demand, and the cross-petition by EEOC to enforce it, that is the subject of this litigation.

The district court (Pet. App. 11-17) ordered enforcement of the Demand with the exception of the requested information concerning segregation of patients.[2] The district court stated that even if seg-

[2] The demand requested the following information concerning segregation of patients (Pet. App. 13):

A written response to the following questions:

a. Does Texas State Optical instruct its employees at any of its Houston facilities to fill in Negro patients' applications for service with red ink or red pencil and to use black or blue ink or pencil for patients other than Negroes.

b. Has Texas State Optical ever so instructed its employees at any Houston facility or elsewhere?

[Footnote continued on page 4]

regation of patients by petitioners made Mrs. Chavez uncomfortable in her job, she was not "aggrieved" in the sense intended by Title VII of the Civil Rights Act of 1964, and that segregation of patients is of no concern to EEOC (Pet. App. 15). The court held that Mrs. Chavez had no standing to assert, and the Commission no power to investigate, a claim of segregation of non-employees.

On appeal, a divided panel of the court of appeals reversed and held that the Commission was entitled to the information concerning the segregation of patients as specified in the Demand. One of the judges in the majority voted to enforce the Demand on the ground that the relationship between an employee and his working environment (which includes the alleged segregating of patients) "is of such significance as to be entitled to statutory protection" (Pet. App. 22); the other majority judge concurred on the ground that Mrs. Chavez's charge of segregation of patients could be interpreted as alleging discrimination

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[2] [Continued]

c. Do Texas State Optical records of patients for service at its 306 Northline Mall, Houston, Texas, facility now contain, or have they within the last two years contained, any application filled out in red ink or pencil?

d. If the answer to "c" is "yes," why were they filled out in red?

Respondent Texas State Optical is to make available to a representative of the Equal Employment Opportunity Commission its records of patients' applications for service at its 306 Northline Mall, Houston, Texas, facility for purposes of inspection.

against her by petitioners in that, because of her ethnic status, she was allowed to have contact only with patients of a particular race, contrary to 42 U.S.C. 2000e-2 (Pet. App. 30).

ARGUMENT

The decision of the court of appeals recognizes that the Equal Employment Opportunity Commission has the authority, during a preliminary, administrative investigation of a charge of racial discrimination in employment, to investigate allegations of racially discriminatory practices of an employer against its customers to determine whether there is a reasonable connection between such alleged practices and an allegation by an employee that the employer had discriminated against him in employment. While the specific issue raised may be novel, the decision below is in accord with the principles established in other cases interpreting Title VII and other statutes authorizing administrative investigations, and there is no conflict among the courts of appeals. Accordingly, review by this Court is not warranted.

An EEOC investigation of a charge of discrimination in employment under 42 U.S.C. 2000e-5 is a preliminary, non-adversary, administrative procedure, the purpose of which is to determine whether there is reasonable cause to believe that the charge is true. *Graniteville Co.* v. *Equal Employment Opportunity Commission*, 438 F.2d 32 (C.A. 4); *General Employment Enterprises, Inc.* v. *Equal Employment Opportunity Commission*, 440 F.2d 783 (C.A. 7); *Sanchez*

v. *Standard Brands, Inc.*, 431 F.2d 455 (C.A. 5). The Commission has statutory authority to "require the production of documentary evidence relevant or material to the charge under investigation," 42 U.S.C. 2000e-9(a), so that it may make a determination as to reasonable cause, and, if appropriate, seek to eliminate the alleged unlawful practice by conciliation.

Either of the grounds relied on below for permitting access to records on segregation of patients is in accord with the statutory scheme of Title VII, which favors informal resolution of charges. The purpose of the charge is "not to state sufficient facts to make out a prima facie case," but is simply to provide information sufficient to initiate EEOC's investigation. *Graniteville Co.* v. *Equal Employment Opportunity Commission*, *supra*, 438 F.2d at 38; *Jenkins* v. *United Gas Corp.*, 400 F.2d 28 (C.A. 5). The charge is entitled to broad construction by the Commission since Title VII's enforcement provisions were, as stated below, intended to be utilized by the "most unlettered and unsophisticated employees" (Pet. App. 28, 32). See *Sanchez* v. *Standard Brands, Inc.*, *supra*; *King* v. *Georgia Power Co.*, 295 F. Supp. 943 (N.D. Ga.); *Jenkins* v. *United Gas Corp.*, *supra*; *Parliament House Motor Hotel* v. *Equal Employment Opportunity Commission*, 444 F.2d 1335 (C.A. 5). Clearly, Congress did not intend that an employee should be denied access to EEOC's broad investigatory and conciliatory functions merely because he lacked the expertise or capacity to express himself clearly and concisely in legal terms. Cf. *Love* v. *Pullman Co.*, Nos. 70-5033, 70-

37, decided January 17, 1972. The EEOC, as a federal administrative agency, is not limited to the precise language of the charge but can investigate matters which are reasonably relevant to that charge in determining whether Title VII has been violated. See *United States* v. *Morton Salt Co.*, 338 U.S. 632, 640-643.

Finally, petitioners' suggestion that the refusal to enforce the Demand in its entirety was a matter within the discretion of the district court is erroneous. As previously indicated (Statement, *supra*, pp. 3-4), the district court based its order on statutory interpretation rather than grounds of discretion. Thus, the question decided by both courts below and presented here—whether Title VII authorizes the Commission to investigate charges of segregation of patients in situations such as this—is a legal issue not dependent for resolution on an exercise of discretion by the district court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Opportunity Commission.

MAY 1972.

APPENDIX

Section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 706(a), 42 U.S.C. 2000e-5(a) provides in pertinent part:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, * * * that an employer * * * has engaged in an unlawful employment practice, the Commission shall furnish such employer * * * with a copy of such charge and shall make an investigation of such charge * * *. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during

and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. * * *

Section 709(a) 42 U.S.C. 2000e-8(a) provides:

> (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable time have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

Sections 710(a), (b), and (c), 42 U.S.C. 2000e-9 (a), (b), and (c), provide in pertinent part:

> (a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority * * * to require the production of documentary evidence relevant or material to the charge under investigation.
>
> (b) If the respondent named in a charge filed under section 706 fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 709(a), * * * the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him * * * to comply with the demand of the Commission * * *.

(c) Within twenty days after the service upon any person charged under section 706 of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 709(a), such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. * * * Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this title or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person.

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